Mohd Nasir bin Mustafa v Mohd Hanafiah bin Hanafi & Ors and another suit

HIGH COURT (ALOR SETAR) — CIVIL SUIT NOS 23NCVC-1–3 OF 2012 AND 23NCVC-7–9 OF 2012
SEE MEE CHUN JC
21 MARCH 2013

Tort — Damages — Defamation — Alleged defamatory statements against state assemblyman/claimant broadcasted on television — Claimant pictured as irresponsible, negligent and inefficient in carrying out duties as state assemblyman — Whether statements defamatory — Whether statements refer to claimant — Whether statements published by defendants to third party

Tort — Defamation — Defences — Alleged defamatory statements against state assemblyman/claimant broadcasted on television — Defences of qualified privilege and fair comment — Whether journalist was responsible

The present claim for damages arose subsequent to alleged defamatory statements made by the first and second defendants against the plaintiff in a television programme called 'Rancangan Titik Sentuhan' ('the programme') which was broadcasted on RTM1 and reported by one Daud Abdullah ('the reporter'). The third defendant named in the present claim was the producer of the programme while the fourth defendant was the Director General of Jabatan Penyiaran Malaysia. The plaintiff, a state assemblyman alleged that statements by the first and second defendants on the programme, in their natural and ordinary meaning, intimated that, inter alia, the plaintiff was irresponsible, negligent and inefficient in carrying out his duties as a state assemblyman. Further, the alleged defamatory statements suggested that the plaintiff failed to repair roads, failed to approach and listen to the woes of his constituents besides practicing discrimination in the development of his constituents. The defendants argued that there occurred non-compliance of ss 5 and 6 of the Government Proceedings Act 1956 due to the plaintiff's failure to name the reporter as the latter was the source of information and the plaintiff relied on the statements in the programme as the basis of his claim. In denying liability, the third and fourth defendants put up the defences of fair comment; qualified privilege and contended that they should not be responsible for the statements made by the first and second defendants.

Held, allowing the claims in part:

(1) A public officer had been named and it was sufficient that in this case, *Ketua Pengarah Penyiaran* had been named as the fourth defendant (see para 12).

(2) The clear words 'wakil rakyat … Nasir' by the first defendant and 'YB Nasir' by the second defendant and the introductory words to the programme could only refer to the plaintiff. On publication, there could be no doubt the programme was broadcasted and this was in fact admitted by the third and fourth defendants. The first and second defendants' failure to file appearance and statements of defence amounted to an admission of plaintiff's claim against them (see paras 6–7).

(3) The statements portrayed plaintiff negatively, as irresponsible, incapable of solving problems in his constituency, inefficient and seldom visited his constituents. Further, it was further conveyed as if there was a political agenda behind the seeming inability to resolve the problem. The statements imputed to the plaintiff a dishonorable or discreditable conduct or motive and constituted defamation (see para 11).

(4) The information for the programme giving rise to the defamation was premised mainly on statements from the first and second defendants' comments and MADA's response. Although the programme was on the unrepaired road in the plaintiff's constituency and referred to his inability to solve the problem, there was no attempt to seek the plaintiff's comments which meant his side of the story was not obtained. No evidence was offered as to why the plaintiff's response was not sought other than to say it was not necessary. However MADA's response was sought and broadcasted. This was an edited programme which meant that there was an opportunity for the third and fourth defendants to seek the plaintiff's comments. The nature of the programme whereby it would only be broadcasted when the problem was resolved meant there was no urgency requiring immediate broadcast thereby dispensing with the need to verify and seek the plaintiff's response. All these pointed towards irresponsible journalism (see para 23).

(5) There was no award for aggravated and exemplary damages as the conduct of the third and fourth defendants did not amount to oppressive, arbitrary and unconstitutional action (see para 30).

[Bahasa Malaysia summary

Tuntutan untuk ganti rugi ini terbangkit berikutan kenyataan berunsur fitnah yang didakwa telah dilakukan oleh defendan pertama dan kedua terhadap plaintif di dalam program televisyen dikenali sebagai 'Rancangan Titik Sentuhan' ('program tersebut') yang disiarkan di RTM1 dan dilaporkan oleh Daud Abdullah ('wartawan tersebut'). Defendan ketiga yang dinamakan di dalam tuntutan ini adalah penerbit rancangan tersebut manakala defendan keempat merupakan Ketua Pengarah Jabatan Penyiaran Malaysia. Plaintif, ahli dewan negeri mendakwa bahawa kenyataan oleh defendan pertama dan kedua di dalam program, dalam maksud semulajadi dan asal, menggambarkan

bahawa, antara lain, plaintif adalah tidak bertanggungjawab, cuai dan tidak efisyen dalam menjalankan tugasnya sebagai ahli dewan negeri. Selanjutnya, kenyataan berunsur fitnah yang didakwa mencadangkan bahawa plaintif gagal untuk membaiki jalan raya, gagal untuk mendekati dan mendengar penyelesaian penduduk-penduduk kawasan pilihan rayanya melainkan melakukan diskriminasi di dalam perkembangan penduduk-penduduk kawasan pilihan rayanya. Defendan-defendan berhujah bahawa terdapat ketidakpatuhan ss 5 dan 6 Akta Prosiding Kerajaan 1956 disebabkan kegagalan plaintif untuk menamakan wartawan mendapatkan dia merupakan sumber informasi dan plaintif telah bergantung kepada kenyataan-kenyataan di dalam program sebagai asas tuntutannya. Dalam menafikan liabiliti, defendan ketiga dan keempat telah mengemukakan pembelaan ulasan saksama; kepentingan bersyarat dan berhujah bahawa mereka seharusnya tidak bertanggungjawab untuk kenyataan-kenyataan yang dilakukan oleh defendan pertama dan kedua.

Diputuskan, membenarkan sebahagian tuntutan:

(1) Pegawai awam telah dinamakan dan ia adalah mencukupi bahawa di dalam kes ini, Ketua Pengarah Penyiaran telah dinamakan sebagai defendan keempat (lihat perenggan 12).

(2) Perkataan yang jelas iaitu 'wakil rakyat … Nasir' oleh defendan pertama dan 'YB Nasir' oleh defendan kedua dan perkataan pengenalan kepada program boleh merujuk kepada plaintif. Merujuk kepada penerbitan, tidak ada keraguan bahawa program tersebut telah disiarkan dan ini adalah fakta yang diakui oleh defendan ketiga dan keempat. Kegagalan defendan pertama dan kedua untuk memfailkan kehadiran dan penyataan pembelaan membawa kepada pengakuan tentang tuntutan plaintif terhadap mereka (lihat perenggan 6–7).

(3) Kenyataan-kenyataan mengambarkan plaintif secara negatif, sebagai tidak bertanggungjawab, tidak berkemampuan untuk menyelesaikan masalah penduduk-penduduk kawasan pilihan rayanya, tidak efisyen dan jarang melawat penduduk-penduduk kawasan pilihan rayanya. Selanjutnya, ia seterusnya disampaikan seperti terdapat agenda politik di sebalik ketidakmampuan untuk menyelesaikan masalah. Kenyataan yang dikatakan kepada plaintif adalah tindakan atau motif mengaibkan atau memalukan dan membentuk fitnah (lihat perenggan 11).

(4) Informasi untuk program membawa kepada fitnah adalah terutamanya berpremiskan kenyataan daripada komen-komen defendan pertama dan kedua dan balasan MADA. Meskipun program tersebut adalah berkenaan dengan jalan raya yang tidak diperbaiki di dalam kawasan pilihanraya plaintif dan merujuk kepada ketidakmampuannya untuk menyelesaikan masalah, tidak terdapat cubaan untuk mendapatkan komen plaintif yang mana bermaksud cerita di pihaknya tidak diperoleh.

Tiada keterangan yang diberikan tentang mengapa balasan plaintif tidak diperoleh melainkan mengatakan ia adalah tidak perlu. Walau bagaimanapun balasan MADA telah diperolehi dan disiarkan. Ini merupakan program yang disunting yang mana bermaksud terdapat peluang bagi defendan ketiga dan keempat untuk mendapatkan komen plaintif. Sifat program tersebut di mana ia hanya akan disiarkan apabila masalah telah diselesaikan bermaksud tidak terdapat desakan yang mana memerlukan siaran segera selanjutnya mengetepikan keperluan untuk mengesahkan dan mendapatkan balasan plaintif. Kesemuanya menunjukkan kewartawanan yang tidak bertanggungjawab (lihat perenggan 23).

(5) Tidak terdapat award untuk ganti rugi keterlaluan dan teladan memandangkan tindakan defendan ketiga dan keempat tidak membawa kepada tindakan penindasan, arbitrari dan tidak berperlembagaan (lihat perenggan 30).]

Notes

For cases on defamation, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 209–231.

For cases on defences, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 391–414.

Cases referred to

Binaan Sentosa Sdn Bhd v Ng In Kun & Anor [2011] MLJU 897; [2012] 2 CLJ 232, HC (refd)

Chew Peng Cheng v Anthony Teo Tiao Gin [2008] 5 MLJ 577; [2008] 8 CLJ 418, HC (folld)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)

Dato' Seri Anwar Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492; [2010] 5 CLJ 301, HC (refd)

Karpal Singh a/l Ram Singh v DP Vijandran [2001] 4 MLJ 161; [2001] 3 CLJ 873, CA (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

Lewis v Daily Telegraph [1964] AC 234, HL (refd)

MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals [1995] 2 MLJ 493; [1995] 2 CLJ 912, CA (refd)

Noor Asiah bte Mahmood & Anor v Randhir Singh & Ors [2000] 2 MLJ 175; [2000] 5 CLJ 407, HC (refd)

Reynold v Times Newspapers Ltd [1999] 4 All ER 609, HL (refd)

Roshairee bin Abd Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39, HC (refd)

A *Shah Latiff Sdn Bhd & Satu Lagi v Karam Singh Walia & Yang Lain* [2012] 1 CLJ 542, HC (distd)
Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd [2010] 9 MLJ 320; [2010] 7 CLJ 885, HC (refd)

B **Legislation referred to**
Defamation Act 1957 s 9
Government Proceedings Act 1956 ss 5, 6

Aminudin Zulkipli (Amirul Fairuzzeen Jamaludin with him) (Zainul Rijal Talha & Amir) for the plaintiff.
C *Ruzaimah Mohd Ridzuan (Legal Advisor's Office) for the third and fourth defendants.*

See Mee Chun JC:

D

[1] On 18 December 2011 at 9pm there was a broadcast of a television programme called 'Rancangan Titik Sentuhan' (programme) over RTM1 which allegedly contained statements defamatory of plaintiff. This is the
E plaintiff's claim for defamation against D3 and D4 in Civil Suit 23NCVC-1–3 of 2012 and D1 and D2 in Civil Suit 23NCVC-7–9 of 2012. On 10 September 2012 both civil suits were consolidated for hearing. The plaintiff is a state assemblyman for Kubang Rotan constituency in Kedah. D1 and D2 are individuals who uttered the defamatory statements which were then broadcast
F on the programme along with other statements made by the reporter on location, one Daud Abdullah. D3 is the producer of the programme and D4 the director general of Jabatan Penyiaran Malaysia.

[2] The alleged defamatory statements (statements) are set out in paras 7–8
G of the statement of claim as against D3 and D4.

> Defendan Pertama telah mengeluarkan kata-kata:
>
> Wakil rakyat sini ni hat baru ni Nasir kira eh tak pernah turun lagilah. Adapun Ahli Parlimen jauh sekali. Tak pernahlah datang. Pasai tu kita tang-tang rupa pun kami
H tak pernah tengok lagu mana dia. Kami duduk kawasan ni memang kecewalah sangat-sangat. Pasai pa, kawasan lain kami tengok pembangunan naik taraf semua. Kawasan sini pasai pa ketinggalan macam kami ni anak tiri saja.
>
> Defendan Kedua telah mengeluarkan kata-kata:
>
I Saya ada maklum kepada kerajaan negeri iaitu YB Nasir. Dia pun datang berjumpa saya. Dia kata jalan ni bawah tangan MADA. Dia kata, peruntukan pun kena daripada kerajaan pusat. Itu ja lah yang dijawabnya. Lepas tu, saya ada mesej dan telefon kepada dia tapi sampai sekarang pun tiada jawapan.
>
> Melalui ulasan pengacara siaran Titik Sentuhan

Mereka mendakwa telah menjadi mangsa konspirasi politik kerana wakil rakyat yang diamanahkan menjadi wadah penyelesaian langsung tidak pernah menjenguk.

Bukan itu jawapan yang mereka inginkan malah mereka memerlukan usaha dan tindakan biar pun masalah jalan ini tak sebesar mana namun dakwa penduduk apa yang dilaungkan oleh kerajaan pakatan rakyat 'KEDAH SEJAHTERA' hanya ungkapan semata.

Apabila jalan sedia ada tak terurus dan dinaiktaraf bukan sahaja mengundang kemalangan malah mengundang kemarahan rakyat yang terlibat.

Walaupun jalan ni tak sejauh mana tapi kepentingannya yang merupakan keperluan. Penduduk mendakwa bagi meneruskan kelangsungan hidup, yang susah perlu dibantu walaupun berlainan fahaman politik. Itulah sebaik-baiknya.

Tak sampai 3 bulan kami menerima jawapan cadangan yang diberikan daripada pihak MADA. Kini penduduk di Kampung Hilir, Teluk Talipon, Kubang Rotan, Kuala Kedah telah mendapat jawapan sebenar. Kami turut teruja dengan tindakan segera pihak ICU Kota Setar, Jabatan Perdana Menteri melalui MADA dengan janji dan tindakan yang telah dilaksanakan.

[3] As against D1 and D2 they are set out in para 4 of the statement of claim and are identical to the portion set out above beginning with 'Defendan Pertama telah mengeluarkan kata-kata' and 'Defendan Kedua telah mengeluarkan kata-kata'.

[4] The plaintiff states in para 10 of 23NCVC-1–3 of 2012 and para 6 of 23NCVC-7–9 of 2012 the statements in their natural and ordinary meaning mean the following:

(a) Plaintif adalah seorang wakil rakyat atau ADUN yang tidak bertanggungjawab dalam menjalankan tugas;

(b) Plaintif adalah seorang ADUN yang gagal mendekati masyarakat dan gagal melawat kawasan dewan undangannya;

(c) Plaintif telah mengamalkan diskriminasi pembangunan terhadap masyarakat di kawasan undangannya;

(d) Plaintif adalah seorang ADUN yang tidak mendengar aduan masyarakat dalam dewan undangannya dan tidak menangani aduan-aduan mereka;

(e) Plaintif langsung gagal dan tidak mampu bertindak membantu menyelesaikan masalah penurapan jalan di Kampung Hilir, Jalan Pondok Talipon, Kubang Rotan, Kuala Kedah;

(f) Plaintif adalah seorang ADUN yang tidak efisyen;

(g) Plaintif merupakan wakil rakyat yang gagal untuk menunaikan tanggungjawab sebagai wakil rakyat selepas memenangi pilihanraya umum tahun 2008 sebagai ADUN Kawasan Kubang Rotan, Kedah;

(h) Plaintif bukanlah individu yang layak untuk dipilih semula sebagai calon

wakil rakyat di kawasan Dewan Undangan Negeri (DUN) Kubang Rotan, Kedah pada pilihanraya umum yang akan datang kerana gagal bertindak untuk menyelesaikan masalah rakyat.

ELEMENTS OF DEFAMATION

[5] It goes without saying it is well settled law that in order to prove a claim on defamation three elements must be established — (a) the statements must be defamatory, (b) the statements must refer to plaintiff and (c) the statements must be published by the defendants to a third party.

REFERENCE AND PUBLICATION

[6] On reference to the plaintiff, it is clear the words 'wakil rakyat … Nasir' (by D1), 'YB Nasir' (by D2) and the introductory words to the programme 'kami akan membawa anda tentang sungutan penduduk di Kampung Hilir Kubang Rotan, Kuala Kedah' and 'wakil rakyat yang diamanahkan' (by Daud Abdullah) can only refer to the plaintiff who is the state assemblyman for Kubang Rotan constituency. On publication there can be no doubt the programme was broadcast on 18 December 2011 at 9pm by RTM1 and this was in fact admitted by D3 and D4 in para 5 of its defence.

WHETHER STATEMENTS DEFAMATORY

I turn now to the element of whether the statements are defamatory.

As against D1 and D2

[7] As against D1 and D2 although they were present in court throughout the trial their failure to file appearance and statements of defence amounted to an admission of the plaintiff's claim against them.

As against D3 and D4

[8] The complete transcript of the programme is contained in B,1–4. The words in bold attributable to either D1, D2 and Daud Abdullah are the statements complained by the plaintiff to be defamatory. This court will be looking at the complete broadcast as per the transcript in determining defamation. This is because 'one must take into account not only the actual words but the context in which they were used' (*Binaan Sentosa Sdn Bhd v Ng In Kun & Anor* [2011] MLJU 897; [2012] 2 CLJ 232 at p 236). Refer also to *Noor Asiah bte Mahmood & Anor v Randhir Singh & Ors* [2000] 2 MLJ 175; [2000] 5 CLJ 407 '… that a claim for libel whilst not to be founded on a headline or photograph in isolation from the related text, the question whether

the article was defamatory had to be answered by reference to the response of the ordinary reader to the entire publication'.

[9] The classic statement in *Gatley on Libel and Slander* (9th Ed), 1998 at p 7 as to what constitutes defamation still holds true. It states:

> *What is defamatory*. There is no wholly satisfactory definition of a defamatory imputation. Three formulae have been particularly influential: (1) Would the imputation tend to 'lower the plaintiff in the estimation of right-thinking members of society generally'?; (2) Would the imputation tend to cause others to shun or avoid the plaintiff?; and (3) Would the words tend to expose the plaintiff to 'hatred, contempt or ridicule'?.

[10] In the Court of Appeal case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 374; [1999] 1 CLJ 461 the court said at p 467:

> … the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[11] Viewed in this light it can be construed that the statements portrayed the plaintiff negatively, as irresponsible, incapable of solving problems in his constituency, inefficient and seldom visited his constituents. I refer in particular to the statements 'wakil rakyat yang diamanahkan menjadi wadah penyelesaian langsung tidak pernah menjenguk', 'Bukan itu jawapan yang mereka inginkan malah mereka memerlukan usaha dan tindakan … apa yang dilaungkan oleh kerajaan pakatan rakyat 'KEDAH SEJAHTERA' hanya ungkapan semata' and 'Tak sampai 3 bulan kami menerima jawapan cadangan yang diberikan daripada pihak MADA … Kami turut teruja dengan tindakan segera pihak ICU Kota Setar, Jabatan Perdana Menteri melalui MADA dengan janji dan tindakan yang telah dilaksanakan'. Further the words 'mangsa konspirasi politik' conveyed the impression that a political agenda was behind the seeming inability to resolve the problem. The statements imputed to the plaintiff a dishonourable or discreditable conduct or motive and constitute defamation.

(a) Failure to name the RTM1 reporter as the defendant

[12] It was contended the failure to name Daud Abdullah the RTM1 reporter who was the source of information and the person making the statements on the progamme was fatal to the plaintiff's case. This was because the plaintiff relied on the statements in the programme as the basis of his claim. There was therefore non-compliance by the plaintiff of ss 5–6 of the

Government Proceedings Act 1956 in not naming Daud Abdullah as the defendant. It is this court's finding it is sufficient that a public officer in this case *Ketua Pengarah Penyiaran* has been named as D4. The case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663 is a case where no public officer but only the federal and state governments had been named thereby rendering neither the state nor the federal government capable of committing the pleaded acts. In this instant case a public officer has been named.

(b) Defences

[13] Although the statements are defamatory of the plaintiff, D3 and D4 may escape liability in accordance with the defence they have put up namely fair comment and qualified privilege. Before proceeding to consider the defences the factual matrix as gathered from the evidence has to be put forth.

[14] As can be seen from the statements the matter concerned a road at Jalan Pondok Talipon, Kubang Rotan which had not been repaired despite D1 and D2 attempts to refer the problem to the plaintiff. The programme had a statement from a representative of MADA that the road was under MADA's jurisdiction and they had applied to Pembangunan Daerah ICU for funds as a result of which the road was repaired.

[15] The plaintiff in paras 9–14 of his witness statement listed his efforts at reaching out to his constituents. This was not challenged other than on relevance. Paragraphs 15–23 of his witness statement deals with how he handled the road issue from when he first received a written request for the repair of the road from Syed Mohd Rahim Syed Jasin ('PW2') on 8 March 2009 and his site visit on 13 March 2009. In April 2009 he contacted MADA only to be informed there was no allocation for repair work. He then wrote to Pihak Berkuasa Perlaksanaan Koridor Utara by letter dated 3 June 2010 for which there was no response. His next course of action was to write to the State Economic Planning Unit ('UPEN') on 13 January 2011. On 7 July 2011 the letter of award to upgrade the road was issued to Khodri Enterprise ('Khodri') and the work was completed on 3 August 2011 when Khodri submitted its claim for payment. The evidence on when the problem was first referred to the plaintiff was supported by PW2 and PW3 (Abdul Razak bin Ramli) and the work done by PW4 (Mohammad Khodri bin Mohamad Noor from Khodri). The evidence was not challenged by the D3 and D4 other than who eventually funded the repair whether it was ICU or the State District Office. In fact the evidence was used by the D3 and D4 to say the road had not been repaired for a long time.

[16] From the evidence of DW1 (the producer and D3) and DW2 (Daud

Abdullah) the involvement of the D3 and D4 in the programme was *pengeditan*, *pengumpulan*, *penyiaran dan penerbitan berita* for general information. The programme was published for the benefit of the public and was of public interest. The concept was to broadcast complaints of the public which had been resolved with the appropriate response. They had a legal, moral and social responsibility to publish such news. The source for the programme was D1 and D2 and MADA had been contacted for a response but not the plaintiff. Recording for the programme started in March 2011 after the receipt of complaints. Once the road had been repaired the recording for broadcast was done in July or August 2011. The programme was edited in Kuala Lumpur. For the programme DW2 was on location twice, the first for five days and the second for three days. The total crew members was four. The RTM reporter in Kedah was not involved in the programme. MADA's response was sought as the road was under its jurisdiction. Both DW1 and DW2 saw no necessity to refer to the plaintiff for a response although he had been referred. DW2 agreed the number of days he was on location was sufficient for him to get a response from anyone and that the crew and RTM reporter in Kedah could also obtain responses.

(c) Fair comment

[17] Section 9 of the Defamation Act 1957 ('Act 286') provides as follows:

> 9. In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion having regard to such of the facts alleged or referred to in the words complained of as are proved.

[18] The aforesaid section does not define fair comment but merely states the circumstances under which the defence shall not fail. In *Chew Peng Cheng v Anthony Teo Tiao Gin* [2008] 5 MLJ 577; [2008] 8 CLJ 418 the court said at p 593 (MLJ); p 432 (CLJ):

> It is trite that to succeed, the defence must establish: (1) the words complained of are comment, though it may consist of or include inferences of facts, (ii) the comment is on a matter of public interest, (iii) the comment must be based on facts, (iv) the comment is one which a fair minded person can honestly make on the facts proved.

[19] Applying the above test to the facts of the instant case where the comments 'mereka mendakwa menjadi mangsa konspirasi' and 'wakil rakyat yang diamanahkan … tidak pernah menjenguk' are not based on facts which a fair minded person can make based on the evidence presented. Although there was a delay in the road repair there was nothing to suggest it was due to a

political conspiracy or the lack of trying by the plaintiff.

(d) Qualified privilege

[20] In this connection reference is made to *Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd* [2010] 9 MLJ 320; [2010] 7 CLJ 885 and *Shah Latiff Sdn Bhd & Satu Lagi v Karam Singh Walia & Yang Lain* [2012] 1 CLJ 542 where both cases had applied the principles laid down in *Reynold v Times Newspapers Ltd* [1999] 4 All ER 609. In *Sivabalan P Asapathy* the court said at p 340 (MLJ); p 907 (CLJ) that two requirements must exist for the defence of qualified privilege namely:

(a) That the publication concerned a matter of public interest; and

(b) That the steps taken to gather, verify and publish the information were responsible and fair (responsible journalism).

[21] As to whether the publication was one of public interest the court said at pp 340–341 (MLJ); p 907 (CLJ):

> A matter is said to be of 'public interest' if the public had an interest in matter as opposed merely to being interested in matters. Being interested in matter would refer to matters which were merely titillating or salacious or gossipy. Matters which were of public interest on the other hand included those which affect the public in terms of governance of their country, their safety, security and right to judge public representatives fairly on the basis of real information.

[22] That being the case the statements being in the nature of an elected state assemblyman not being able to resolve road repairs would fall in the realm of public interest as the public has a right to judge if their elected representatives are up to mark or otherwise. I would however add that road repair per se is not a matter of public interest; using it to measure the performance of an elected representative is. This is to be distinguished from *Karam Singh Walia* where environmental concerns was held to be a matter of public interest. There the court said p 567:

> Orang awam adalah jelas berhak untuk dimaklumkan tentang perkara yang berhubungan dengan alam sekitar. Perkara ini berkepentingan awam bahawa kesalahan tingkah laku terhadap alam sekitar perlu didedahkan kepada perhatian awam demi untuk kepentingan awam.

[23] As to whether the publication amounted to responsible journalism, *Sivabalan P Asapathy* following *Reynolds* set out ten matters to be considered as pointers. Referring to those matters, those pertaining to seriousness of the allegation, tone of article and circumstances of publication including timing

may weigh in D3 and D4 favour. However there are other matters which goes against them and these relate to source of information, status of information, steps taken to verify the information, urgency, whether comment was sought from the plaintiff and whether the article contained the plaintiff's side of the story. The information for the programme giving rise to the defamation was premised mainly on statements from D1 and D2 along with DW2's comments and MADA's response. Although the programme was on the unrepaired road in the plaintiff's constituency and referred to his inability to solve the problem there was no attempt to seek the plaintiff's comments which meant his side of the story was not obtained. No evidence was offered as to why the plaintiffs response was not sought other than to say it was not necessary. However MADA's response was sought and broadcasted. This was an edited programme which meant there was an opportunity for D3 and D4 to seek the plaintiff's comments which DW2 admitted there was sufficient time and manpower in the form of the crew and RTM reporter in Kedah to do so. The nature of the programme whereby it would only be broadcast when the problem was resolved meant there was no urgency requiring immediate broadcast thereby dispensing with the need to verify and seek the plaintiff's response. All these point towards irresponsible journalism.

[24] Although the first test of public interest has been passed, the second test of responsible journalism has not, such that D3 and D4 cannot avail themselves to the defence of qualified privilege.

STATEMENTS MADE BY D1 AND D2

[25] It was also contended the statements were made by D1 and D2 and D3 and D4 should not be responsible for their acts of defamation. As per *Lewis v Daily Telegraph* [1964] AC 234 at p 260, 'repeating someone's else's libellous statement is just as bad as making the statement directly'. Further the programme also contained the comments of DW2 which this court had earlier found to be defamatory.

DAMAGES

[26] D3 and D4 contended the plaintiff had not proved damage to his reputation and his standing in society was still intact and the plaintiff in cross-examination when asked how he was viewed by society after the programme said he was unsure. The case of *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493; [1995] 2 CLJ 912 approached this at p 519 (MLJ); p 928 (CLJ) as follows:

> General damages are damages which the law presumes to flow from, and as it were be the natural and probable consequence of the defendants' act. Therefore general damages need not be specifically nor need any evidence be produced to prove them as such ….

[27] As there was defamation the plaintiff would be entitled to general damages which the law presumes to flow from the natural and probable consequence of the defendants' act. In *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161; [2001] 3 CLJ 873 examined the trend of awards of damages over a 20 year period had this to say at p 185 (MLJ); pp 902–903 (CLJ):

> … what is binding is the principle laid down in the Federal Court in assessing damages in libel cases, not the amount. The amount to be awarded in case depends on the facts and the circumstances of the case. Indeed, how much is too much, how much is too little and how much is reasonable is quite subjective.

[28] *Gatley on Libel and Slander* states that factors that can be taken into account when assessing damages are conduct of claimant, his position and standing, the nature of the libel, the mode and extent of the publication and the absence or refusal of any retraction or apology.

[29] The factors I have taken into consideration are the position of the plaintiff as a state assemblyman, the broadcast of the programme on prime time television which D3 states can fetch an audience of 500,000 and the fact of a press conference by the plaintiff on 19 December 2011 where the plaintiff gave his side of the story attended by the RTM1 reporter in Kedah but not given any airtime. I would assess damages to the plaintiff at RM120,000, RM50,000 to be borne equally by D1 and D2 and the remaining RM70,000 by D3 and D4. Refer to *Dato' Seri Anwar Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 5 CLJ 301 where no substantial damages was awarded and at pp 522–523 (MLJ); p 332 (CLJ) it was stated:

> … The law of defamation … must be more about truth and reputation than money … the compensation principle in tort defamation should focus primarily on vindication through both monetary and non monetary means.

The vindication here is the recognition the plaintiff has been defamed.

[30] There is no award for aggravated and exemplary damages as the conduct of D3 and D4 does not amount to oppressive, arbitrary and unconstitutional action as contemplated in *Roshairee bin Abd Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39.

[31] The claim for an apology is not allowed as the award of general damages will suffice.

CONCLUSION

[32] The plaintiff's claim against D3 and D4 in para 17(a) of statement of

claim in 23NCVC-1–3 of 2012 is allowed for which a sum of RM70,000 is awarded. Paragraph 17(b)–(d) is dismissed. Costs to the plaintiff.

[33] The plaintiff's claim against D1 and D2 in para 13(a) of statement of claim in 23NCVC-7–9 of 2012 is allowed for which a sum of RM50,000 is awarded to be borne equally by D1 and D2. Paragraph 13(b)–(d) is dismissed. No costs.

Claims allowed in part.

Reported by Afiq Mohamad Noor